International Association of Bridge, Structural, Reinforcing and Ornamental Iron Workers, Local Union No. 75, AFL–CIO *and* L. G. Lefler, Inc., d/b/a Defco Construction. Case 28–CB–1782

29 February 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On December 3, 1982, Administrative Law Judge Clifford H. Anderson issued the attached decision. Thereafter, the General Counsel filed exceptions and the Respondent filed cross-exceptions and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] In dismissing the complaint, we note that the General Counsel failed to prove by a preponderance of the evidence that the Respondent sought to enforce a contract clause which would have designated the Employer's representatives for collective bargaining. Accordingly, we do not pass on the principles of *Clyde Taylor Co.*, 127 NLRB 103 (1960), nor do we adopt the judge's discussion of *Masters, Mates & Pilots (Cove Tankers Corp.)*, 224 NLRB 1626 (1976).

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge: This case was tried before me in Phoenix, Arizona, on September 28, 1982, pursuant to a complaint and notice of hearing issued by the Regional Director on August 25, 1982, based on a charge filed by L. G. Lefler, Inc., d/b/a Defco Construction (the Charging Party or the Employer) against International Association of Bridge, Structural, Reinforcing and Ornamental Iron Workers, Local Union No. 75, AFL–CIO (Respondent or the Union), on April 28, 1981.

The complaint as amended at the hearing alleges that Respondent restrained and coerced the Employer in the selection of its representatives for purposes of collective bargaining or adjustment of grievances by maintaining and prosecuting a civil action in the United States District Court for the District of Arizona, thereby violating Section 8(b)(1)(B) of the National Labor Relations Act. Respondent filed an answer admitting certain portions of the complaint but essentially denying the conduct attributed to it and further denying that it had in any manner violated the Act as alleged.

FINDINGS OF FACT

All parties were given full opportunity to participate at the hearing,[1] to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file posthearing briefs.[2] Upon the entire record herein, including a brief from the General Counsel, I make the following findings of fact.[3]

I. JURISDICTION

The Employer is an Arizona state corporation engaged in the building and construction industry. Its principal place of business is in Tucson, Arizona. During relevant times, the Employer has enjoyed an annual gross volume of business in excess of $500,000 and has annually purchased and received in the State of Arizona goods from suppliers located outside the State of a value in excess of $50,000.

II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. *Background*

The Union at all relevant times has represented employees employed in the ironworkers craft in the State of Arizona. The Employer has at relevant times been engaged in commercial and industrial construction and the construction management business. With the single exception noted, infra, the Employer has never employed ironworker employees and, as of the time of the hearing, had no intention to do so in the future. The Employer regularly subcontracts ironworkers' work on its construction projects.

Certain employers in the steel fabrication and erection industry in Arizona formed an informal association which in or around 1969 evolved into the Arizona Steel Field Directors Association (in each case the Association). The Association negotiated successive contracts with the Union covering the ironworker employees of authorizing member-employers for the periods, 1965–1970, 1970–1974, 1974–1977, 1977–1980, and 1980–1982. Both the 1977–1980 and the 1980–1982 contracts have grievance and arbitration clauses which provide, inter alia, for the processing of grievances and arbitrations on

[1] While the complaint and the subsequent order scheduling hearing were served on all parties, only the General Counsel appeared at the hearing. The Employer's principal participated as a witness.

[2] Counsel for the General Counsel stated at the hearing that counsel for Respondent had informed her that he intended to file a brief in the matter. Accordingly, I set the maximum time permissible under the Board's Rules and Regulations for the submission of posthearing briefs. No request for an extension of time to file briefs was made by any party. Only counsel for the General Counsel submitted a brief.

[3] The findings herein where not otherwise indicated are based on admissions in Respondent's answer or on uncontested credible testimonial or documentary evidence.

behalf of the contracting employers by representatives of the Association. The Employer has never been a member of the Association nor has the Employer ever authorized the Association to bargain with the Union on its behalf.

In 1968 the Employer briefly employed ironworkers on a Tucson construction project. The Union and the Employer entered into agreement which the Employer's admitted agent signed on June 7, 1968. That agreement adopted the then current 1965–1970 contract between the Union and the Association. That agreement contained the following provision:

SECTION 21. *Grievance Procedure*

> Any dispute as to the proper interpretation of this Agreement, in all matters other than craft jurisdiction, shall be handled in the first instance by a representative of the Union and the Employer and if they fail to reach a settlement within forty-eight (48) hours it shall be referred to the Industrial Council, Inc., by the aggrieved party. The Industrial Council, Inc., shall arrange a meeting of a Board of Arbitration to be composed of two (2) Employer representatives, two (2) Union representatives, and a fifth member selected by the Board who shall have no business or financial connections with either party. The decision of the Board of Arbitration shall be handed down within forty-eight (48) hours after the selection of the fifth member and the decision of the Board of Arbitration shall be final and binding upon both parties.
>
> The Board of Arbitration shall have jurisdiction over all questions involving the interpretation and application of any section of this Agreement. It shall not, however, be empowered to handle negotiations for a new agreement, changes in the wage scale, or jurisdictional disputes.

The 1965–1970 contract stated at section 24 that the collective-bargaining agreement

> . . . shall continue in full force and effect until July 31, 1970, and from year to year thereafter, unless at least sixty (60) days' notice has been given in writing by either the Employer or the Union of a desire to change or modify the terms of this Agreement prior to July 31, 1970, or July 31 of any subsequent year.

After about a month, the Employer ceased to employ ironworkers. At the same time the Employer ceased applying the terms of the contract. It has never applied or attempted to apply the contract to its subcontractor's employees.

There is conflicting evidence concerning whether the Employer received notice of an intention to terminate the agreement from the Union. L. G. Lefler testified that the Union never gave the Employer notice of an intention to terminate the agreement. The memorandum and order of District Judge Earl H. Carrol, cited and discussed in detail, infra, notes that the Employer had submitted in that case the affidavit of the Employer's then vice president, Thomas L. Roos Jr., the agent who signed the agreement with the Union. The decision of the court notes that Roos asserted that the Union gave the Employer notice of its intent to modify the contract in May 1970. There is no dispute that the Employer did not meet and bargain with or sign another agreement with the Union at any time. Nor has the Employer entered into agreements of any kind with the Union's International.

B. *The Union's Lawsuit*

About September 1980 the Union filed a petition to compel arbitration in the United States District Court for the District of Arizona, naming the Employer as defendant. The suit alleged that the Employer and the Union had been at all relevant times bound to a collective-bargaining agreement,[4] that the Employer was failing and refusing to pay wages and trust contributions as provided by the contract, and that the Employer was otherwise violating the contract by, inter alia, refusing to process the Union's grievances or take them to binding arbitration despite the Union's demand that it do so. The Union by its suit sought an order compelling the Employer to

> . . . immediately cease its refusal to submit the dispute regarding its failure to abide by and/or comply with the collective-bargaining agreement, and [submit] all other disputes with respect to the interpretation and application thereto, to binding aribitration.

Other than the petition and the court's decision, the record is devoid of testimony of substantive documents concerning the litigation. On May 4, 1982, Federal District Court Judge Earl H. Carrol issued his memorandum and order (CIV 80-806 PHX-EMC). Judge Carrol's order granted the Employer's Motion for Summary Judgment and dismissed the petition. In essence Judge Carrol ruled that any automatic renewal of the 1965–1970 agreement had been prevented when the Union notified the Employer in May 1970 of its intent to change or modify the contract. The court found this notification to be tantamount to giving a notice of termination. The court found as a matter of law that the contract terminated on July 31, 1970, and was not in effect thereafter. Given that the contractual violations alleged by the Union occurred after the expiration of the contract, the judge ruled the petition to compel arbitration should be dismissed and so ordered.

As of the time of the hearing herein, no motion for reconsideration, notice of appeal, or request for extension of time for filing of notice of appeal had been filed by any party to Judge Carrol's order. Thus the court's

[4] The Union's petition asserted that a copy of the collective-bargaining agreement was attached to the petition and incorporated by reference as Exh. A. The copy of the petition introduced into evidence by the General Counsel had no attachment Exh. A. Lefler testified that, while served with a copy of the petition in October 1981, the copy he received did not have an attachment. He further testified that he assumed but was not sure that the exhibit reference was to the 1965–1970 Association contract which the Employer adopted in 1968. The copy of the 1965–1970 Association contract received into the record as G.C. Exh. 3 is marked on its cover as Exhibit A.

memorandum and order may now be regarded as final and no longer susceptible to timely appeal.[5]

C. *Analysis and Conclusions*

1. The theory of the General Counsel

Extensive colloquy with counsel for the General Counsel at the hearing, and consideration of her post-hearing brief, reveals that the General Counsel's case may be divided into three parts. First is the argument that the Union in filing its lawsuit had an object prohibited by Section 8(b)(1)(B) of the Act. Second is the argument that the filing and maintenance of the lawsuit, standing alone, constitutes restraint and coercion within the meaning of Section 8(b)(1)(B) of the Act and is not otherwise sheltered under what has become known as the *Clyde Taylor*[6] doctrine. Third is the issue of an appropriate remedy, if any, given that the lawsuit was dismissed and the time for appeal passed. I will deal with these issues separately.[7]

2. Did the Union's lawsuit have an object prohibited by Section 8(b)(1)(B) of the Act?

Counsel for the General Counsel argues that if a union seeks to compel an employer to accept contractual provisions for the selection of management designees on arbitration boards, which representatives are not of the employer's choosing, the union violates Section 8(b)(1)(B) of the Act, *Plumbers Local 525 (Federated Employers of Nevada)*, 135 NLRB 462 (1962). She further argues that a union that insists that an employer designate its grievance adjustment representatives in accordance with a contract to which that employer is not a party also violates Section 8(b)(1)(B) of the Act, citing *Masters, Mates & Pilots (Cove Tankers Corp)*., 224 NLRB 1626 (1976), enfd. 575 F.2d 896 (D.C. Cir. 1978). The cases cited support the General Counsel's assertions. It follows therefore that if the Union's suit herein had as an object the binding of the Employer to an agreement to which it was not a party and which provided for the selection of grievance and/or arbitration representatives not of its own choosing, then its object is impermissible under Section 8(b)(1)(B) of the Act.

Turning to the Union's lawsuit, it is not clear from the evidence offered at trial what particular contract the Union was asserting in its petition as binding on the Employer. The General Counsel argues on brief:

> Although it is unclear which collective-bargaining agreement supposedly supports the Petition (TR 24), both the 1977–1980 and the 1980–1982 [Association] agreements provide for an Arizona Labor Management Committee, composed of representatives from both the Respondent and [the Association], to hear grievances at a prearbitration level (GCX 6, 7, Sec. 21). The unmistakable language of these agreements indicates that this committee, whose composition and selection is not of [the Employer's] choosing, has the authority to adjust grievances. The [Association] representatives on the committee represent the various employers and, accordingly, are clearly encompassed in the language of Section 8(a)(1)(B) regarding employer representatives for the adjustment of grievances.

The complaint alleges and the answer denies that the Union's suit sought as a remedy the Employer's compliance with an Association contract subsequent to the 1965–1970 Association agreement. It is thus clear that the General Counsel is arguing that the Union's lawsuit had as its goal the declaration by the court that a recent Union-Association contract was binding on the Employer. I agree with the General Counsel that, if this was the object of the petition, the Union has violated Section 8(b)(1)(B) of the Act as alleged. Turning to the facts of the case, however, I reject her argument concerning the identity of the contract which was the object of the Union's petition.

For several reasons I am convinced that the only fair inference possible on this record is that the Union was attempting in its lawsuit to bind the Employer to the terms of the 1965–1970 Association agreement separately adopted by the Employer in 1968. First, an examination of analysis of Judge Carrol makes it clear that the Union's theory, albeit rejected by the court, was an automatic renewal theory, i.e., that the 1965–1970 contract, by its terms, renewed itself and was therefore in effect after 1970 as between the Employer and the Union. Automatic renewal would but bind the parties to the old contract. Thus, the Union's asserted contract in its petition must have been the 1965–1970 Association agreement adopted by the Employer in 1968. The 1965–1970 Association agreement did not provide for the adoption of other agreements. The Employer at no time assigned its bargaining rights to the Association nor had it ever signed another agreement with the Union. Thus there is no plausible theory or argument that the Union was attempting by its petition to compel arbitration under the terms of any other contract including recent Association contracts.

Second, the Union's petition to compel arbitration referred by its terms to a specific contract and noted it was attached as "Exhibit A." The 1965–1970 agreement introduced into evidence by the General Counsel was marked "Exhibit A" without explanation. The Employer's principal testified that he assumed that the Union was seeking to bind the Employer to the 1965–1970 agreement. The language of the petition and the court's order considered together support this conclusion.

Third, and perhaps most importantly, counsel for the General Counsel bears the burden of proof on each element of her case. The evidence of this issue, noted above, favors a finding the contract was the 1965–1970 Association agreement. The contrary interpretation of-

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[5] See Federal Rules of Appellate Procedure Secs. 1(a), 3(a), 4(a)(1), and 4(a)(5). While counsel for the General Counsel asserted at the hearing that counsel for Respondent had informed her he was considering appealing the decision of the court, I find that statement, as of the time of the instant hearing, was not susceptible to consummation.

[6] *Clyde Taylor Co.*, 127 NLRB 103 (1960), and its progeny.

[7] Any arguments concerning the substantive effects of the period of time between the Union's filing of the lawsuit and the filing of the charge, i.e., over 6 months, and the time limits contained in Sec. 10(b) of the Act, were waived by the Union when it failed to raise them before me. *Sunrise Hospital Medical Center*, 254 NLRB 1377, 1379 fn. 6 (1981).

fered by counsel for the General Counsel, on facts which she concedes on brief are "unclear," is simply without evidentiary foundation. The General Counsel cannot successfully argue that what may only with charity be called "uncertainty" on this issue is sufficient to sustain her argument given the burden of proof she bears.[8]

Having found that the Union sought to compel the Employer to submit to arbitration under the terms of the 1965–1970 Association agreement, it is appropriate to examine that contract's language concerning grievance and arbitration. The only relevant language in the 1965–1970 Association agreement is section 21, quoted in full, above. That language provides that the employers bound by the agreement including, by its 1968 adoption, the Employer, select their own representatives for grievance and arbitration processing. The only exception under this contract is that the parties will use the Industrial Council, Inc. to arrange meetings between union and employer representatives. I do not regard such a facilitation service as falling within the intendments of Section 8(b)(1)(B) of the Act. Thus the attempt of the Union to force the Employer into arbitration under the 1965–1970 Association agreement did not include any contractual restriction on the Employer's selection of its representatives.

Given that the 1965–1970 Association contract does not force the employer, properly or improperly, to appoint representatives not of its choosing within the meaning of Section 8(b)(1)(B) of the Act, it seems clear that the General Counsel's above-cited cases are distinguishable and the Union did not have an impermissible object in filing its suit. This is so because, irrespective of the motive, good faith, or actual or arguable merit of Respondent's suit, the suit could not result in depriving Respondent of its right to choose its own 8(b)(1)(B) representatives. Thus, the Union did not violate Section 8(b)(1)(B) of the Act.

3. Conclusion

Having found that the Union's suit did not have an object of influencing the Employer's representatives for purposes of collective bargaining or grievance and arbitration handling, it is unnecessary to address the other arguments of the General Counsel concerning the *Clyde Taylor* issue or the issue of appropriate remedy. Without an object proscribed by Section 8(b)(1)(B) of the Act, no violation is sustainable, whatever the merits on the General Counsel's remaining arguments. Accordingly, I will make no findings with respect to the remaining contentions of the General Counsel.

Having found the Union at no time sought to restrict the Employer's selection of its representatives within the meaning of Section 8(b)(1)(B) of the Act, I find the Union's actions herein did not violate the Act. Accordingly, I shall dismiss the complaint.

On these findings of fact and the entire record, I make the following

CONCLUSIONS OF LAW

1. The Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Union did not restrain or coerce the Employer in the selection of his representatives for the purposes of collective-bargaining or adjustment of grievances by filing a petition to compel arbitration in the United States Federal District Court for the District of Arizona.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

ORDER[9]

The complaint shall be and it hereby is dismissed in its entirety.

[8] The General Counsel asserts an adverse inference should be drawn against the Union for its failure to comply with the General Counsel's subpoena duces tecum. That subpoena sought, inter alia, the pleading in the lawsuit. I will not draw an inference that Exhibit A, presumably attached to the Union's original pleading, was a document other than the 1965–1970 Association agreement because the Union failed to comply with the subpoena. First, the original pleadings including the petition itself are a matter of public record and are in the custody of the court. As such, they are equally available to all parties to this case. Second, the General Counsel's subpoena does not indicate it was served on counsel for the Union consistent with the requirements of the Board's Rules and Regulations Sec. 102.111(b). Third, even where an adverse inference is otherwise proper, it is permissive and not mandatory. Such an inference should not strain the bounds of logic. Here, there is no reason to believe that the Union's failure to produce a document available to all parties, viewed in the context of the Union's general refusal to appear or participate at all at the hearing, should compel a finding that the missing "Exhibit A" was a recent Association contract.

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.